



In the Matter of:

MARIANNE GRIFFITH,

ARB CASE NO. 98-067

COMPLAINANT,

ALJ CASE NO. 97-ERA-52

v.

DATE: February 29, 2000

WACKENHUT CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances

For the Complainant:

Marianne Griffith, *Pro se*, Pittsgrove, New Jersey

For the Respondent:

Adin C. Goldberg, Esq., *Whitman Breed Abbott & Morgan, LLP*, New York, New York

For the Amicus Curiae:

J. Michael McGarry, III, Esq., Donn C. Meindertsma, Esq., *Winston & Strawn*,
Washington, D.C.; Jeffrie J. Keenan, Esq., *Public Service Electric & Gas Co.*,
Hancocksbridge, New Jersey

FINAL DECISION AND ORDER

This case arises under §5851 of the Energy Reorganization Act and its implementing regulations. 42 U.S.C. §5851 (1995) (also referred to in some decisional law as §211) ; 29 C.F.R. Part 24 (1999). Section 5851 prohibits an employer from discriminating against or otherwise taking an unfavorable personnel action against an employee with respect to his or her compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistle blowing activity. *Id.* at §§5851(a)(1), (b)(3)(C). Section 5851 authorizes the Secretary of Labor to afford personal relief to an employee who has been subjected to an unlawful unfavorable personnel action by ordering the violating employer to take affirmative action to abate the adverse personnel action, reinstate the complainant to his or her former position with back pay, and award compensatory damages, including attorney fees. *Id.* at §5851(b)(2)(B).

Marianne Griffith, a security guard employed by Wackenhut Corporation at the Salem and Hope Creek nuclear power plant in southern New Jersey at all relevant times, filed a complaint under §5851 with the Department of Labor in February 1997. Griffith alleged that Wackenhut violated this provision by suspending her for three days without pay in August 1996 because she reported a security breach to Wackenhut officials. Wackenhut defended on the ground that the suspension was imposed not because Griffith reported the security breach, but because she did not report it until six weeks after it occurred. Griffith's failure to make a timely report constituted a deliberate violation of the facility's safety rules, according to Wackenhut, and therefore was not protected by the Act. 42 U.S.C. 5851(g), "Deliberate violations." Wackenhut further defended on the ground that the suspension did not constitute discrimination or an "unfavorable personnel action" within the meaning of §5851 because the company unilaterally, immediately, completely and before Griffith complained to the Department of Labor rescinded the suspension and made Griffith whole.

The administrative law judge (ALJ) recommends that we find Wackenhut Corporation in violation of §5851. In his view, Griffith's report of a security breach was protected activity, late or not, and not subject to discipline of any kind. ALJ Rec'd Dec. (Jan. 22, 1998).

Wackenhut petitioned for review of the ALJ's recommended decision. We have jurisdiction over this petition for review pursuant to 29 C.F.R. §24.8. We conclude that the complaint must be dismissed for lack of an unfavorable personnel action. Therefore, we do not reach the question whether Griffith's complaint is precluded under §5851(g).

FINDINGS OF FACT

The following findings of fact are consistent with the recommended findings of the ALJ, but substantially amplified. In 1996 and 1997, the Wackenhut Corporation provided security at numerous nuclear power plants, including Salem Hope Creek. Tr. 54. The power plant was operated by the Public Service Electric and Gas Company ("PSE&G") under license to the Nuclear Regulator Commission (NRC). Tr. 94.^{1/} Wackenhut and PSE&G employees intermingled in their work, and representatives of the Nuclear Regulatory Commission were on site on a daily basis. Tr. 7, 11, 88.

1. The investigation

On August 14, 1996, an NRC Resident Inspector noticed that a lock on a Wackenhut badging cubicle door was taped so that the lock could not engage and unauthorized persons could freely enter. R. Ex. 1 Attachment 1. The NRC notified Wackenhut of this security breach. Officials at

^{1/} References to the transcript appear as "Tr." followed by the transcript page number. References to Complainant's exhibits appear as "C. Ex." followed by the document number and page number if relevant. References to Respondent's exhibits appear as "R. Ex." followed by the document number and page number if relevant.

Wackenhut's national headquarters assigned three top managers from other power plants under contract with Wackenhut to investigate the matter.

The investigators arrived at Salem Hope Creek on August 19, 1996. *Id.*; Tr. 6. They were charged with responsibility for investigating the taped lock incident and assessing the security program at Salem Hope Creek generally. During the course of its investigation, the team focused on five specific security breaches that occurred during the period June 4 through August 19, 1996. R. Ex. 1 Attachment 6 p. 32.

The investigators ultimately characterized the five incidents as symptomatic of a pervasive reluctance to follow procedure and resistance to change at all levels up to and including the top Wackenhut manager at Salem Hope Creek. R. Ex. 1 Attachment 7. In the team's final report, for example, the team concluded that the taped lock at the badging booth on August 14 was not an isolated incident. Rather, it was "based upon past practices condoned by both TWC [Wackenhut] supervision and PSEG [sic] representatives." R. Ex. 1 Attachment 1 p. 5.

2. The crane gate incident

Marianne Griffith was personally involved in two of the investigated incidents. The first, and the subject of her complaint, occurred on June 5, 1996. On that day, Griffith and two other Wackenhut security officers, Medierus and Stanton, were assigned to stand guard at the "north crane gate" in fence zone 17, which was opened to permit entry of a truck into secured grounds. They were to remain on guard there until the truck had left and electronic gate and fence security measures were fully restored. The Wackenhut supervisor in charge at the scene was William Pochuski. Also present was a PSE&G employee, Smith. R. Ex. 2; R. Ex. 1 Attachment 7; Tr. 98.

Stanton's assignment was to conduct a "crawl test" after the gate was closed behind the departing truck. This meant Stanton was to crawl through a microwave security system to determine whether it had been reactivated. Tr. 30.

Throughout the assignment, supervisor Pochuski was in radio contact with a higher level supervisor, Krouse. Pochuski kept Krouse apprized of what was being done at each step of the process. Krouse in turn advised Pochuski and kept in radio contact with the shift supervisor, Steve Campbell. Tr. 98 - 99. A PSE&G supervisor also monitored the situation; this individual had to give his approval before a barricade could be moved away from the fence to permit the truck to enter and to be moved back in place after the truck left. Tr. 101 - 102. A surveillance camera filmed the entire event. *Id.*, Tr. 116.

When Stanton asked Pochuski whether it was time for him to perform the crawl test, Pochuski told him the crawl test was not necessary. Tr. 98 - 99; R. Ex. 1 Attachment 5 p. 28. When Stanton questioned this, Pochuski claimed that PSE&G supervisor Decker had told him the crawl test would not be necessary if the truck left no tire marks in the gravel. R. Ex. 1 Attachment 5 p. 26. Griffith argued with Pochuski about this, telling him several times that the crawl test was specifically required by Wackenhut's written procedures and that she had never heard of an exception based on

track marks. Krouse was aware of the dispute, as Pochuski relayed this development to him over the radio. R. Ex. 2; Tr. 98 - 99.

When Pochuski was satisfied that all necessary steps had been taken, he ordered Stanton and Medeiros to leave, which they did. The PSE&G employee also left. Pochuski then escorted Griffith to another zone where she was to conduct a fence check. Shortly after they arrived at the other zone, Krouse came over the radio and asked Pochuski if the crawl test at the north gate had been done. Pochuski said no, repeating that it was not necessary. Krouse again said that the crawl test must be done. Tr. 31, 39, R. Ex. 2; R. Ex. 1 Attachment 5 pp. 26, 27. Griffith testified that Pochuski then turned to her and said that between the two of them, they had never left Zone 17. Pochuski and Griffith returned to Zone 17, Stanton returned, and at last the crawl test was done. Tr. 99, R. Ex. 1 Attachment 5; R. Ex. 1.

Shortly before she left for the day, Griffith passed Krouse in one of the facility's buildings, and he asked her what she knew about the incident. She told him what she knew. Tr. 19, 101. Griffith also wrote a brief report of what had happened, which she gave to her union representative because, as the investigators later put it, "she was upset about Pochuski's statement to her that 'we never left the area of Zone 17.' She believed that what happened was wrong, but she was afraid to disobey an order from a supervisor." Ex. 1 Attachment 5 p. 27. Moreover, it was her impression from the brief exchange with Krouse that he would not take any further action. Tr. 19 - 20.

3. The metal detector incident

The second incident involving Griffith occurred on August 19, the day the investigators arrived at Salem Hope Creek. On that day Griffith was posted at a metal detector through which PSE&G workers had to pass in order to enter a secured area. One of the PSE&G workers came through Griffith's metal detector twice, setting off the alarm both times. Tr. 102 - 103; R. Ex. 1 Attachment 2 p. 9. Griffith instructed him to remove his keys and other metal and try again. Rather than do this, however, the man went through another metal detector near Griffith's. He set off the alarm there as well. The security officer at the second detector asked him to try again, he did, and he triggered the alarm again. At this point, Griffith told the other officer that this individual had now set off the alarm a total of four times and that he must be patted down. However, since both the security officers were women, they wanted a male security officer to do the pat-down. *Id.*

Griffith ordered the PSE&G worker to stay where he was while she found a supervisor. Pochuski happened to be nearby, and Griffith explained to him what had happened and that they needed a male officer for a pat-down. Tr. 104. Pochuski seemed annoyed about the fact that two female officers had been assigned to the security check point in the first place and ordered Griffith to go find a male officer herself. Tr. 104-105.

Griffith left the PSE&G worker and Pochuski standing by her metal detector. She eventually found a male security officer in a building some distance away, sent him to her metal detector, and stayed to replace him at his post. Tr. 105. Soon thereafter, Pochuski appeared at Griffith's elbow and asked her which man had set off the metal detector four times. She reminded him that she had shown him the man when she asked him to get a male officer for the pat-down. *Id.* Pochuski

thereupon pulled her from her station and rushed her back to the metal detector, where she found about ten men standing at her machine. Pochuski asked her which of these men it was, and she replied that he was not there. “He says, what do you mean he’s not here, and I said, he’s not here, the man that I told you, you know, about getting the pat-down was not here. Next thing you know, he runs directly on site looking for this man, and then he came back off site.” Tr. 106

Thirty minutes to an hour later, the head of the PSE&G security department appeared and showed Griffith a list of workers and asked her if she knew the name of the missing worker and could identify it on the list. Tr. 107. Griffith did remember the man’s last name, and it was on the list. The PSE&G supervisor thereupon took her to a processing center where employee photos are kept. He pulled out the photo of the man Griffith had identified on the list, and Griffith recognized him as the worker who had set off the alarms and then disappeared. With this help, PSE&G was able to locate the man, showed him to Griffith in a line up, and she was able to confirm they had the right individual. *Id.*

The Wackenhut investigatory team concluded that Griffith had followed correct procedures but that a number of supervisory errors had occurred, not the least of which was Pochuski’s failure to take control of the PSE&G employee. The investigators also faulted Pochuski for failing immediately to notify his supervisor of the event and thus delaying initiation of a proper response. R. Ex. 1 Attachment 1 p. 11.

4. Griffith’s interview

The team interviewed Griffith as part of their investigation of the metal detector episode. The interview was conducted in an office, with the participants seated around a table -- Griffith, her union representative, and three men -- two of the Wackenhut investigators and either the third investigator or a representative of PSE&G. Tr. 45 - 46, 95. The investigators told her their purpose was to “make things better” at Salem Hope Creek. In addition to questioning her about the metal detector incident, they asked her “all kinds of questions whether I had trust in them and whether I didn’t, and why or why not, and what kind of communication did we all have between one another. . . .” Tr. 96. Taking their questions at face value, Griffith told the investigators she did not have confidence in her supervisors and, as an example of why, described the crawl test incident: “why I didn’t trust supervision. . . . Well, my supervisor and all, like he sat there and said like between you and me this incident never took place.” *Id.*

5. Griffith’s suspension without pay and reprimand

The investigators concluded that Griffith had violated Wackenhut’s written procedures by failing to report the crawl test problem to a supervisor within an hour after it occurred. Tr. 33 - 34. At the hearing, the chief investigator stated that it was Griffith’s responsibility to report the incident up the supervisory chain until she found an official willing to take corrective action, and if that meant taking it all the way to the resident NRC official, so be it. Tr. 75 - 80. In support of this testimony, Wackenhut submitted one page from Wackenhut’s written security plan for Salem Hope Creek. R. Ex. 5. The chief investigator particularly relied on item 3.2:

All Security Organization Personnel: Regardless of position or post assignment, are responsible to:

- * Be constantly alert for and immediately report, any conditions which may indicate the onset of a security contingency event or degraded security.
- * If a condition of degraded security is discovered, to remain at the location as a compensatory measure until the condition is corrected or until relieved.

R. Ex. 5. Griffith, however, testified without rebuttal that the document from which the page marked R. Ex. 5 was taken contained another page, at the very beginning, “and it would say that we’re to adhere to all written and verbal instructions that are handed down to us by our supervisors.” Tr. 96. Another Wackenhut exhibit, R. Ex. 3 p. 3, directly confirms Griffith’s testimony: “This section contains absolute requirements of duty performance or behavior where non-compliance will result in termination from employment. Nuclear Security Personnel shall not: * * * Willfully disregard an instruction given by supervision or other authority. . . .”

The next day, Thursday August 22, Griffith’s supervisor advised her that she was being placed on administrative leave and sent her home. When Griffith asked why, he said he thought “it was over the issue with me talking to an NRC representative concerning that particular fence zone.” Tr. 108. Griffith protested that she had not reported the incident to the NRC. “I in turn told him at that time that I had not spoke to any NRC representative at all, and in fact, I didn’t say anything to anyone at all about the Hope Creek zone 17 at that point of, you know -- I didn’t go into great detail. My union did that. They went into the great detail about the issue. . . .” Tr. 110 - 111 (the allusion to communications between the union president with the NRC and others, are not relevant to this case).

On Friday August 23, two of her supervisors called her at home to tell her she was being suspended for three days for failing to report the crawl test incident when it occurred. Tr. 112. They also told her that the union members who took her written statement were also being suspended for failure to report. Tr. 112 - 113.

On her first day back after the suspension, Griffith’s shift supervisor told that her suspension was being rescinded, that the lost pay would be restored, and that all records of the disciplinary action would be expunged from her personnel files. These measures were in fact fully completed within days of Griffith’s return to work. Griffith was never given any explanation for the rescissionary actions. Tr. 114.

During the course of the investigation, which lasted about two weeks, 18 workers were suspended, 16 of these suspensions were canceled, and the top Wackenhut manager at Salem Hope Creek was fired. Tr. 56, 58. At the hearing, the chief investigator explained that he first decided to put individual employees on leave as inculpatory information about them emerged during the course of the investigation. Tr. 60. But, “[i]n the middle of the investigation we realized -- we, being members of the investigative team, that [the Wackenhut Corporation], and with the utility realized that we were having a severe employee culture problem within the security force. . . . There seemed

to be a real cultural problem on both the utility side and [Wackenhut] side as far as procedure compliance.” Tr. 83. “[B]ecause of the widespread problem we felt that we needed to bring these people back and start afresh. Some of these problems were brought on by the utility as well as by Wackenhut. We had a shared responsibility.” Tr. 85. The last of the rescissionary actions were completed in early September 1996. Tr. 9.

Based on the information available to Griffith, by the autumn of 1996 the following events had occurred: On or before June 5, 1996, Griffith had concluded that her employer was not assuring that its written safety procedures were consistently implemented. In fact, in June and August, Griffith was personally involved in incidents in which her supervisor behaved as if he did not know procedural requirements or thought he could disregard them. She also knew that the locking requirements at the badge cubicle were routinely flouted and that supervisors had long condoned this.

Then Wackenhut sent in a special team of top managers to investigate security lapses and assess compliance with security rules in general. When the team interviewed her, they told her their mission was to “make things better” and that to do so they needed to know if she trusted her supervisors to perform reliably and effectively. They failed to mention that she might be disciplined for anything she told them. But when she trusted the investigators enough to tell them about the crane gate incident as an example of why she did not trust her supervisors, she found herself suspended without pay.

Griffith was given two reasons for her suspension, but neither made sense to her. First her supervisor told her she was being disciplined for reporting the crawl test incident to the NRC. Since Griffith had not discussed the incident with anyone she knew to be from the NRC, she decided that the unidentified man standing in the room when she was interviewed must have been an NRC representative and thus, her statements during her interview must have been statements to the NRC. Tr. 44 - 45. In the meantime, Wackenhut’s investigators knew they never thought Griffith reported the crane gate incident to the NRC and did not know what Griffith’s supervisor had told her. As it happened, the man in the interview room was a PSE&G employee. Tr. 46.

Then another supervisor told Griffith she was being suspended because of her failure immediately to report the crawl test incident up the chain of command until she was satisfied that corrective action would be taken. This reason also seemed illogical to Griffith. After all, three levels of Wackenhut supervisors, up to and including the shift supervisor, were not only aware of Pochuski’s refusal to have the crawl test done, they finally forced him to have it done. She herself argued with Pochuski that the crawl test must be done. Her only deviation from the written requirement at R. Ex. 5 to stay at the site until corrective action is taken, occurred when she complied with another written requirement, R. Ex. 3 p. 3, to obey the direct order of her supervisor, when Pochuski commanded her to go to her next assignment.

Adding yet further mystery, Wackenhut gave no reason for rescinding its disciplinary action against her. When Griffith asked the personnel clerk if the reprimand had been removed from her file, the clerk told her no written reprimand had ever been issued, much less filed.

Most troubling, from Griffith's point of view, the investigators left without giving any indication that further training would be provided or any other action taken to improve competence and communication. "I just was not satisfied that it was all just like a slap on the hand and just thrown away, you know, like it never happened, like fully paying me and wiping my record clean like it never existed, because the problem did exist, and I had to deal with it." Tr. 118.

The only change that Griffith was able to see in early September came not from Wackenhut management, but from a fellow employee. One of Griffith's co-workers posted a notice he found on the Internet advising employees that federal law prohibits discrimination against employees at nuclear power facilities who make safety complaints, and that violations of this law could be reported to the U. S. Department of Labor. Tr. 119. This was a revelation to Griffith, and she resolved to take her concerns to the Department in order to push Wackenhut into addressing the training and communication problems. "I basically wanted it to be known and be on file that there was an existent problem at work, and especially with the communication between the employer and the employees, and they are not fully training us." Tr. 117. She was also indignant about the hazing she was receiving from some coworkers, particularly one or two of Pochuski's friends. Tr. 115 - 118. However, by the time of the hearing in September 1997, Griffith no longer had these concerns. She testified that the hazing soon stopped, that she was pleased with the new Wackenhut manager at Salem and Hope Creek, and that conditions had materially improved. Tr. 116 - 118.

In mid-September 1996, Griffith's father drove her to the Department's regional office, where she was told to put everything in writing. Tr. 120. She did this, but she did not immediately file anything with the Department because her union asked her to "hold off until the outcome of everything is straightened out." *Id.* However, as the 180-day deadline for filing her complaint came near, Griffith felt she had to act. In February 1997, she wrote to the Department of Labor in Washington, D.C. and asked how to make a complaint. "I said that I'd like to know how to make a complaint and concerning what. . . ." Tr. 121.^{2/}

PROCEDURAL HISTORY

The Wage and Hour Division of the Department of Labor's Employment Standards Administration (ESA) investigated Griffith's complaint, and in June 1997 notified the parties of its conclusion that Wackenhut had violated §5851. Noting, however, that Wackenhut had completely undone its actions against Griffith within a matter of days, ESA required only that Wackenhut "provide training for all its supervisors and staff regarding the anti-discrimination provisions of the Energy Reorganization Act."^{3/}

^{2/} The record does not include what Griffith filed with the Department.

^{3/} ESA's letter was not entered into the record. However, Wackenhut relied heavily on its content in its briefs. Thus, Wackenhut waived any objection to its consideration by us, and we take official notice of it. 5 U.S.C. § 556(e).

The ALJ recommended that Griffith's complaint be affirmed, because Wackenhut did suspend Griffith as a result of the information she gave them about the crawl test incident and, late or not, such a report is protected activity *per se*, for which no discipline can be administered. "[W]hen [Griffith] related all of the cited incidents to the investigative team. . . she was, in fact, engaging in protected activity." Rec. D & O at 3. The ALJ also concluded that, "[a]lthough Wackenhut substantially purged itself of its discrimination by rescinding its suspension action, its persistence in maintaining this action demonstrates a lack of understanding of the gravity of its action against the Complainant." *Id.* The ALJ recommended that Wackenhut be required to certify and describe its compliance with ESA's order to conduct training and to reimburse Griffith for the costs of litigation, including travel. *Id.*

DISCUSSION

Neither §5851 of the Energy Reorganization Act nor applicable regulations specify our standard of review. Accordingly, our review is *de novo*. 5 U.S.C. §557(b) (1996).

1. The Statute

Section 5851 provides in relevant part:

§ 5851. Employee protection

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 . . . ;

(B) refused to engage in any practice made unlawful by this chapter . . . if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter. . . ;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter. . . ;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter. . . .

(b) Complaint, filing and notification

* * *

(3)(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (A)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

42 U.S.C. §§5851(a), (b).

A complainant seeking relief under §5851 must prove that her employer took an “unfavorable personnel action” against her in retaliation for her involvement in protected safety activity. *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995). A “personnel action” pertains to the employee’s “compensation, terms, conditions, or privileges of employment.” §5851(a)(1).^{4/}

2. Summary of Disposition

Wackenhut argues that Griffith failed to establish the unfavorable personnel action element of her claim because, “there can be no liability where the employer adequately corrects its employment action on a timely basis, ‘regardless of the specific motivation for the wrongdoing or the particular cause of action.’” Br. at 14.^{5/} In a slight variant on Wackenhut’s theory, *Amicus*

^{4/} Subsection 5851(b)(3)(C) uses the term “unfavorable personnel action.” Throughout this decision we use “unfavorable personnel action” as well as “adverse employment action” as convenient shorthand for the larger formulation expressed in §5851(a)(1) -- “discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment.”

^{5/} Wackenhut also argues that Griffith’s complaint should be dismissed because the sole allegation in her complaint to the Department of Labor was that Wackenhut retaliated against her for reporting the crane gate incident to the NRC. As we have gone to some pains to clarify in our findings of fact, Griffith’s alleged report to the NRC has been a red herring in the case. The question whether Wackenhut violated the Act by suspending Griffith for not reporting the crane gate incident the day it occurred was tried by consent.

Moreover, Griffith represented herself in this case. *Pro se* complainants are by nature inexpert in legal matters, and we construe their complaints liberally and not over technically. *In re Helmstetter v. Pacific Gas & Electric Co.*, No. 91-TSC-1 (Sec’y Labor, Jan. 13, 1993); *cf.*, *Sawyer v. American Fed. Gov’t Employees, AFL-CIO*, 180 F.3d 31 (2d Cir. 1999).

PSE&G^{6/} contends that the suspension was too minor and too interlocutory to constitute a tangible, a material, adverse personnel action, and that personnel actions without tangible adverse employment effects are not covered by §5851. Br. 17-18. Griffith acted *pro se* throughout the litigation of this case and filed no briefs.^{7/}

We conclude that Griffith failed to establish that the disciplinary action Wackenhut took against her adversely affected her compensation, terms, conditions or privileges of employment. The suspension without pay and reprimand caused Griffith three days of anxiety about her employment status but resulted in no financial harm or negative effect on her employment or earning capacity because of the alacrity and thoroughness of Wackenhut's self-corrections. Assuming without deciding that Griffith's unhappiness with her employment at Wackenhut during the late summer and early fall of 1997 were proximately related to the suspension and reprimand, her negative state of mind was too temporary to render the suspension and reprimand "adverse." Because we dismiss the complaint on this ground, it is unnecessary to consider Wackenhut's affirmative defense under §5851(g).

We do not consider Wackenhut's decision to appeal from the Wage and Hour Division's determination to demonstrate, as the ALJ thought, "a lack of understanding of the gravity of its action against the Complainant." Except in the rarest of circumstances, we do not consider a losing party's decision to appeal at all.

3. Wackenhut's disciplinary actions were not adverse within the meaning of §5851

Griffith testified that the suspension without pay caused her an anxious weekend when she did not know what would happen to her next, and she endured a period of light hazing from some of her co-workers for reporting the crane gate incident to Wackenhut and thereby causing upset and disciplinary actions. Griffith did not, however, even suggest that the suspension without pay had any negative financial effect upon her. Indeed, from a strictly financial point of view, Griffith gained from her suspension without pay because she ended up being paid for time she did not work.

"While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is actionable adverse action." *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). *See e.g., Ribando v. United Airlines, Inc.*, 200 F.3d 507 (7th Cir. 1999) (employee's unhappiness over a letter of concern in her personnel file was not actionable because it was not "materially" adverse); *Taylor v. FDIC*, 132 F.3d 753, 764 (D.C. Cir. 1997)

^{6/} PSE&G's June 17, 1998 Motion for Leave to File a Brief *Amicus Curiae* is granted.

^{7/} Consequently, we have framed and addressed such arguments and rebuttal as seem implicit in Griffith's testimony. *Pro se* complainants must understand, however, that our resources are limited and simply cannot be stretched to perform this service regularly. *Cf. Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983) ("At least where a litigant is seeking a monetary award, we do not believe *pro se* status necessarily justifies special consideration. * * * While such a *pro se* litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to void the risks of failure that attend his decision to forgo expert assistance").

(repeated failure to designate complainants as “acting” managers during their supervisor’s absences deemed “too minor” to be adverse); *Smart v. Ball State, supra* (humiliation over negative performance evaluation during training did not make the evaluation adverse); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994) (job transfer that resulted in fewer secretarial duties and more stress not adverse because the changes were not materially significant disadvantages); *Passer v. American Chemical Society*, 935 F.2d 322 (D.C. Cir. 1991) (last minute cancellation of a “rare and prestigious” seminar in complainant’s honor would be adverse **if** the complainant could prove the cancellation would make it more difficult for him to find future employment).

In our view, these decisions make the unexceptionable point that personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on the employee’s “compensation, terms, conditions or privileges of employment.” (“Temporary” is an important concept here; we do not suggest that the psychological effect of a personnel action on the targeted employee could never establish the adverseness of the personnel action.)

Moreover, in this particular case, it was the employer itself that aborted adverse consequences. Wackenhut’s investigators decided almost immediately that the suspension without pay was not justified, that the company’s own management was at least as responsible as staff members for noncompliance with security rules and procedures. The officials who imposed the suspension in the first place were also the officials who recognized and corrected their error of judgment -- within two working days and without any resistance from elsewhere in company management. The officials recognized their error on their own; no grievance had to be filed, no prodding from the NRC or the Labor Department was necessary. Griffith’s lost pay was restored immediately (if, indeed, the order to cut her pay ever even took effect), and the letter of reprimand was expunged from her personnel file immediately (if the letter was ever even written or placed in her file). And finally, the investigating officials developed recommendations for curing the underlying training and supervision deficiencies. These recommendations were implemented at Salem Hope Creek, and Griffith herself testified that less than six months later conditions at the facility were much improved.

Thus, if we look at the entire episode from beginning to end, we see that the personnel action against Griffith was taken and undone in a two-to-three-week period that began when the company was confronted with charges from the NRC about a security breach in the badging department. In investigating this problem, company officials learned about other security breaches, including Griffith’s supposed failure to make an adequate report of the crane gate incident on the day it occurred. The investigators first saw the incidents as individual lapses by noncompliant staff members. But they quickly realized that the problem was systemic; company managers had not provided adequate training and staff members had not received adequate supervision. Thus, in a matter of days, Wackenhut officials went from deciding to suspend every staff member involved in a security breach, to realizing management’s share in the problems, to rescinded the suspensions, including Griffith’s. From this perspective, Wackenhut’s action against Griffith can be fairly described as a brief stumble in an ultimately successful effort to discover and fix safety deficiencies.

This is where the companies’ argument that a suspension and pay cut can be too “mediate,” too “interlocutory,” to be truly adverse takes on some force. The difficulty with their claim,

however, is that it goes too far. Wackenhut and PSE&G are proposing not merely that Wackenhut's corrective actions eliminate adverse effects in this case. They argue for the broader principle that only the last step in a multi-step personnel action is relevant to the question of adverse character. Such an undifferentiated approach to the concept of "unfavorable personnel action" creates rigidities that would encourage employers to shoot first and ask questions later, counting on their ability to "cancel" the adverse action at the last minute should the employee file a §5851 complaint. Section 5851 is remedial legislation, and as such should not be construed so illiberally. *Cf. Bechtel Constr.*, 50 F.3d at 932.

To put it differently, under the companies' approach, the outcome would be the same whether the employer took weeks to self-correct as happened here, or took months, with the employee bearing the consequences of the delay. A pay cut that is never implemented or is restored within a matter of days is quite a different thing from a pay cut that is restored weeks or months later. The same principle applies to letters of reprimand in personnel files.

Moreover, a general rule that would preclude consideration of the timing, reasons, and nature of the employer's corrective actions would thwart the underlying statutory goal. The provision is meant to encourage covered employees to speak out about safety hazards without fear of reprisals and to encourage covered employers to respond constructively and without reprisals. Viewed in their entirety, Wackenhut's actions certainly sent the right message to employees and resulted in safety improvements.

It should also be noted that a 1992 amendment to §5851 bespeaks Congress' continuing concern that §5851 not become a vehicle for negligible claims. Under the heading, "Avoidance of frivolous complaints," Congress raised the bar for both sides in nuclear power whistleblower complaint cases. First, it raised employers' burden of proof in dual motive cases from the "preponderance of the evidence" standard to the "clear and convincing evidence" standard, thereby discouraging employers from litigating in close cases. Second, it established a kind of weeding out mechanism for complaints by prohibiting the Department of Labor from investigating a complaint unless the employee has made a prima facie showing to the investigators that he or she engaged in protected activity and that the protected activity was a contributing factor in an unfavorable personnel action. Also, the investigation must stop if the employer proves to the investigators by clear and convincing evidence that it would have taken the unfavorable personnel action in the absence of protected behavior. H. Rep. No. 102-474 (VIII) at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2282, 2297.

4. §5851 exists for the sole purpose of providing whistleblower victims with a personal remedy

We recognize that a body of decisional law holds that the absence of a tangible injury goes only to remedy, not to whether the employer committed a violation of the law. *See e.g., Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997), *cert. denied*, 523 U.S. 11, 118 S.Ct. 1803 (1998) (the employer's dissemination of an adverse job reference "violated Title VII because it was a 'personnel action' motivated by retaliatory animus. That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability"); *Smith v. Secretary of the Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981) ("[a]n illegal act of discrimination whether based on race or some other

factor such as a motive of reprisal is a wrong in itself under Title VII, regardless of whether the wrong would warrant an award of back pay or preferential hiring).

We find these rulings inapposite. In the first place, the courts in those cases identified concrete harm that could come from the employers' retaliatory conduct. In *Hashimoto*, the court noted "the chilling effect which Lowery's retaliatory conduct might have on the remaining employees under his supervision does counsel against the . . . narrow conception of [no harm, no foul]. Accordingly, we conclude that the retaliatory dissemination of a negative employment reference violates Title VII, even if the negative reference does not affect the prospective employer's decision not to hire the victim of the discriminatory action." 118 F.3d at 676. In *Smith*, the panel cited the potentially negative employment consequences of leaving the negative evaluation in the personnel file; it "could both prejudice the employee's superiors and materially diminish his chances for advancement." 659 F.2d at 1120. Thus, neither decision presented a case where adverse employment impact was truly absent.

More importantly, however, the violation-without-remedy concept is particularly at odds with §5851, because §5851 was created for the sole purpose of providing a remedy to nuclear industry whistle blowers. In this respect, §5851 can be distinguished from some of the other whistleblower statutes enforced by the Labor Department.

Long before §5851 was added to the ERA in 1978, the Atomic Energy Commission and later, its predecessor the Nuclear Energy Commission, held and exercised authority to prohibit whistleblower retaliation by covered employers and to force employers who do retaliate to stop their illegal personnel practices and to correct any safety problems identified by whistle blowers. *See*, 38 Fed. Reg. 22,217 *et seq.* (1973); 45 Fed. Reg. 15,184 *et seq.* (1980); 58 Fed. Reg. 52,406 *et seq.*; 61 Fed. Reg. 24,336 *et seq.* (1996).

NRC, although without authority to provide a remedy to an employee, has independent authority under the [Atomic Energy Act] to take appropriate enforcement action against Commission applicants and licensees and their contractors that violate the AEA or Commission requirements . . . which prohibit discrimination against employees based on their engaging in protected activities. NRC enforcement action may include issuance of a Notice of Violation to the responsible applicant, licensee, contractor, and/or individual; imposition of a civil penalty; issuance of an order removing the responsible individual from licensed activities; and/or license denial, suspension, modification or revocation.

63 Fed. Reg. 57,324 (1998) (Memorandum of Understanding Between the Department of Labor and the Nuclear Regulatory Commission).^{8/} *Cf. English v. General Electric Co.*, 496 U.S. 72, 87, 90;

^{8/} The Atomic Energy Commission and the Nuclear Regulatory Commission both have used this power to great effect. *See e.g., In re Union Electric Co. (Callaway Plant)*, ALAB-527 (NRC Atomic Safety and Licensing Appeal Board, Feb. 23, 1979); *In re Duke Power Co. (Catawba Nuclear Station)*, Nos. 50-413, 50-414 (NRC Office of Inspection and Enforcement, June 4, 1985); 10 C.F.R. Parts 19, 30, 40, 50, 60, 70

(continued...)

110 S.Ct. 2270, 2279, 2281 (1990) (in rejecting preemption claims, noting that “[o]n its face, [§5851] does no more than grant a federal administrative remedy to employees in one industry,” and “many, if not most, retaliatory incidents come about as a response to safety complaints that employees register with federal regulatory agencies. The Federal Government thus is already aware of these safety violations, whether or not the employee invokes the remedial provisions of [§5851]”).

In this regard, we respond to one of Griffith’s reasons for filing this complaint. Griffith testified that she hoped to prod Wackenhut into providing better training and better supervision by getting the Department of Labor involved. But §5851 is not the proper mechanism for that. As we have reported, employees who have concerns about nuclear energy safety hazards should report them to the NRC, which has all the necessary legal authority to force nuclear energy employers to rectify safety problems. The Department of Labor does not have that authority under the Energy Reorganization Act. And, indeed, the NRC did investigate both the crane gate incident and Griffith’s charge of discrimination. NRC Investigation No. 1-96-031, Docket Nos. 50-272, 311, 354.

⁸(...continued)
and 72 (1998).

CONCLUSION

Accordingly, the petition for dismissal is **GRANTED**.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

Concurrence

E. Cooper Brown, concurring:

I write separately to emphasize that I concur in the disposition of this case based on the *particular* facts of the case. For this reason, I do not view the disposition reached today as establishing any broad rule of law.

E. COOPER BROWN
Member